Proposed NLRA Regulations Have Employer Bar Up In Arms

Judd H. Lees

WILLIAMS KASTNER

With the apparent demise of the Employee Free Choice Act legislation as well as the downturn in the economy, management labor lawyers foresaw a precipitous drop in union organizing activity in 2011 and 2012. However, recent actions by the National Labor Relations Board and the Obama administration threaten to disturb the reverie. First, the Board's general counsel took on Boeing's relocation of one of its lines to the management-friendly state of South Carolina. Then, on June 21, 2011, the Department of Labor published proposed rules that threaten to significantly change union election procedures and redefine so-called "persuader activity." The *Wall Street Journal* has called the proposed regulations "the most sweeping change to the federal rules governing union organizing since 1947," and the rules are viewed as a major concession to Labor, perhaps to make up for the failed legislation. What are the proposed regulations and, more importantly, what would they mean for labor and employment lawyers?

Current Election Procedures

Under the existing election process involving the National Labor Relations Board, employers generally have sufficient time to respond to union certification petitions by providing employees a more complete picture about unionization such as the financial costs of representation, the restrictive union constitution and bylaws, as well as the possibility of strikes and fines for members. Even unsuspecting employers can still muster an effective "vote no" campaign in the 30 to 40 days currently available under Board procedures. This "critical period" before a secret ballot election must, by law, be free from coercive activity designed to undermine the employees' exercise of their rights under the Act, but there is a lot of leeway under Section 8(c) of the Act for employers to win the hearts and minds of employees. Unions, via the Employee Free Choice Act, unsuccessfully targeted this valuable employer time by attempting to convert the existing secret ballot election process to one consisting merely of counting union authorization cards to see if more than 50 percent of employees had signed one. In that setting, no employer campaign was possible. With the failure of the legislation, some unions have attempted to convince employers to sign neutrality agreements to give up their Section 8(c) free speech rights, sit on the sideline, and abide by authorization card showings held by very helpful, and very "neutral," union organizers. Most employers decline and opt for a campaign in order to counteract the months of union organizing leading up to the election.

Judd H. Lees

Proposed "Quickie" Election Regulations

Under the proposed rules, the secret ballot process remains, but the election procedure would be significantly streamlined and elections held as quickly as 10 days from the filing of petitions. Brian Hayes, a member of the NLRB, did not mince words in his unflattering review of the proposed rules: "[T]he principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." The proposed changes call for electronic transmission of election petitions and notices to speed things up, the holding of pre-election hearings within seven days of the filing of the petition, and the filing of an employer "statement of position" prior to the pre-election hearing as well as a preliminary voter list, including employee names, work locations, shifts and classifications. Under existing practice, no such list needs to be provided.

Additional changes include the deferral of election challenges until after the election if involving less than 20 percent of the proposed bargaining unit as well as the limit on appeals to a single post-election request. Finally, the so-called "Excelsior" list of eligible voters, which currently requires full names and addresses to enable the union to contact them, would also require phone numbers and email addresses. And the list would need to be provided within two – rather than the current seven – days of the direction of election.

The overall effect of these proposed changes would be to dramatically reduce the time between the filing of a petition and the holding of an election from the current median of 38 days to between 10 and 21 days. Again, the primary impact of the shortened time period is to hamstring the employer's ability to carry out a coherent campaign against unionization.

Current Persuader Rules

In addition to time to muster an employer campaign, employers often require the services of third-party attorneys and management consultants since most employers are unsophisticated about both unionism as well as the federal labor laws governing election conduct. Absent training and guidance, management, and especially supervisors, easily overstep the boundaries of acceptable conduct; overstep too much and there is no election – there is, instead, a mandatory bargaining order with the union. Section 203 of the Labor Management Reporting and Disclosure Act ("LMRDA") currently requires these third-party so-called "persuaders" to file Form LM-10 disclosing financial information, not only about the client being served but also other clients receiving similar labor law assistance. Based upon these attendant Form LM-10 financial disclosures, management attorneys are understandably reluctant to be characterized as "persuaders."

Fortunately, Section 203(c) of the LMRDA currently provides an exception to the reporting requirement for third parties who merely provide "advice." The Department of Labor has, to date, interpreted the "advice" exception fairly broadly to exclude all assistance where the third party does not have direct contact with the eligible voters. This "advice" exception not only applies to traditional advice or overview, but also to preparation of speeches to employees. In the event the employer wishes to have a third party communicate with employees directly, attorneys often bring in management consultants who do not mind the resulting financial disclosures required.

Proposed Tightening Of "Advice" Loophole And Resulting Reporting Requirements

Under the proposed regulations, the "advice" exception would be significantly limited to an "oral or written recommendation regarding a decision or course of conduct." Carved out of the "advice" exception (and hence now reportable persuader activity) is any third-party consultation involving material or communications conveyed to an employer, or any actions, conduct, or communications on behalf of the employer that, "in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize and bargain collectively." The "directly or indirectly" caveat has most management labor lawyers extremely nervous.

The proposed regulations clarify that persuader activities will include, but not be limited to: (1) drafting, revising or providing speeches, written communications or other materials to an employer for presentation to employees; (2) planning individual or group meetings aimed at persuading employees to vote against a union; (3) training supervisors or employer representatives how to conduct such individual or group meetings; (4) coordinating or directing the activities of supervisors; and (5) developing personnel policies or practices aimed at convincing employees to reject unions. In anticipation of passage of the rules, regional offices of the NLRB have already sent out notices to attorneys filing notices of appearance on behalf of employers in union representation proceedings of the potential need for Form LM-10 reports from them.

The regulations exclude attorney conferences or group seminars for employers as long as the sole purpose is to provide guidance to them. However, conducting a seminar for supervisors or employer representatives on union organizing does appear on the "persuader" checklist. In addition, the new rules would require reporting for information-supplying activities based on research or investigations concerning employees or labor organizations, as well as any surveillance activities. All appear on the revised Form LM-20 for reporting.

The concern with the narrowing of the "advice" exception is twofold. First, the revised line between "advice" and "persuader activity" is confusing. For example, supervisory training regarding lawful and unlawful conduct during a pre-election period may not be designed for a specific employee presentation, but one could argue that such advice is aimed to provide supervisors with mini-speeches or talking points to answer individual employee concerns or questions and thus is persuader activity. Similarly, revisions of handbook policies regarding "open door" policies could be construed as union avoidance and therefore persuader activity since, according to Department of Labor guidance, persuader activity need only have an "indirect" object of persuading employees about their union rights.

Second, the ramifications for guessing wrong are substantial. Attorneys who cross the line must file Revised Forms LM-20 and LM-21 requiring the attorney and the law firm to disclose in writing receipts for *all* labor relations advice or services provided to *all* employers during the year, regardless of whether that advice was related to persuader activity – an anathema for most management attorneys and their law firms. The Form LM-20 will require information about the agreement between the attorney and the employer, the fees involved and the scope and nature of the employment. A separate report must be filed for each agreement or arrangement made with each employer for whom persuader services are provided.

Director John Lund of the Office of Labor-Management Standards ("OLMS"), who is responsible for enforcing the new regulations, attempted to quell management concerns in a July 11, 2011 web chat by stating that the new regulations would not present a threat to the attorney-client privilege. Mr. Lund commented that he did not foresee the need to examine the content of attorney-client communications in order to determine whether they constituted "persuader" activity or exempt "advice." However, again, the somewhat amorphous nature of the proposed regulations would appear to make such an inquiry necessary, and management attorneys who have regularly filed notices of appearances in certification and decertification petitions (which will trigger a Board notice that a report may need to be filed) will think twice about continuing to represent employers in these settings.

It would therefore appear that the administration is attempting to do via regulations what it has been unable to do to date via legislation – nullify, or as Board Member Hayes stated, "eviscerate" the ability of employers to mount an effective campaign against unionization. If the regulations pass, employers and their counsel will have little time to scramble to combat an effective union certification campaign. Skilled management labor lawyers may also be reluctant to assist employers for fear their "advice" may be characterized as persuader activity triggering financial reporting. As a result, employers will have to be even more proactive in establishing lines of communication with employees that are in constant use and do not turn on the certification process under the National Labor Relations Act.

***Judd H. Lees** is the Chair of Williams Kastner's Labor and Employment Law Practice Group and is based in the firm's Seattle office. Mr. Lees represents both unionized and nonunionized employers in the private and public sectors, including clients in the construction, manufacturing and transportation industries before federal and state agencies, the Department of Labor, National Labor Relations Board and the Washington State Department of Labor and Industries.*

Please email the author at jlees@williamskastner.com with questions about this article.